

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Fair Isaac Corporation, a	)	File No. 16-CV-1054
Delaware corporation,	)	(WMW/DTS)
	)	
Plaintiff,	)	
	)	Minneapolis, Minnesota
vs.	)	May 8, 2019
	)	2:05 p.m.
Federal Insurance Company, an	)	Courtroom 9E
Indiana corporation, and Ace	)	
American Insurance Company, a	)	
Pennsylvania corporation,	)	
	)	
Defendants.	)	

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BEFORE THE HONORABLE DAVID T. SCHULTZ  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
**(MOTIONS HEARING)**

APPEARANCES

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transcript produced by computer.

1 last day of discovery is timely. That's argument number  
2 one. The case law is clear that it's not. An  
3 impracticality, it certainly is not. When those witnesses  
4 were added on the afternoon of March 22nd, there was nothing  
5 that FICO could have done to prevent or prohibit the  
6 unfairness to FICO. There was nothing left to do on that  
7 afternoon.

8 The next argument is that Federal knew of these  
9 witnesses, the identity of these witnesses prior to their  
10 inclusion on the Rule 26(a) second supplemental disclosures,  
11 but that's not the test under Rule 26(a) awareness of the  
12 witness. The test is has the disclosing party identified  
13 the witnesses as somebody who may come to trial on a  
14 particular subject matter? Awareness of the witnesses in  
15 this case, these 16 people would make them no different than  
16 the hundreds of other people who are identified on Federal's  
17 documents, in their document production, or their  
18 interrogatory responses. Defendants point to nothing that  
19 discloses these people as potential trial witnesses in this  
20 case for the subjects on which they were identified.

21 Now, as we move into each of the groups of the  
22 witnesses, we can explain how the prejudice and the  
23 untimeliness is true. So the first group of people are  
24 employees that verified interrogatory responses number 16  
25 through 20: Hutchinson, Fisher, Jerd, Seeley, and McCarthy.

1           And actually before I get into that, I'd like to  
2       note that there are five witnesses that are not brought up  
3       in Federal's brief at all. There are five witnesses that  
4       Federal does not make the contention that we knew about them  
5       or should have in any way shape or form. And those are  
6       Schraer, Mencke, Theberge, Garnes and Verduin. And I  
7       apologize if I'm butchering all of those names.

8           But back to the verification responses. Federal  
9       says that we knew about these people and, therefore, they  
10      didn't have to add them to their initial disclosures in time  
11      because they were identified on verification pages for those  
12      interrogatories. Those interrogatories, mind you, were  
13      served in 2017. These people began showing up on the  
14      verification pages at the end of 2018, but the verification  
15      pages weren't signed until mid to late March. So there was  
16      no knowledge that they were in fact going to be the  
17      verifying witnesses.

18           But, again, awareness of a person is not the test.  
19      The verifications were not corrective information because  
20      the verifications don't establish that the witnesses will  
21      come to trial to support Federal's claims and defenses, and  
22      the subject matter is broader. If I could pull up --

23           THE COURT: Could I ask you a quick question while  
24      you're doing that?

25           MS. KLIEBENSTEIN: Yes, Your Honor.

1 THE COURT: Do you in the course of this  
2 litigation, did you keep a list? A lot of times if you get  
3 a number of documents produced, you keep a running list of  
4 names in the documents. By any chance did you do that in  
5 this case?

6 MS. KLIEBENSTEIN: You know what, I have  
7 historically not done that in recent years because -- no, I  
8 did not because our electronic database does that for us.  
9 We have to go in and ask any questions about who is on the  
10 to and from line, so we don't keep a list, but we can access  
11 a list. I can tell you it would be hundreds of people.

12 THE COURT: That was ultimately what I wanted to  
13 know.

14 MS. KLIEBENSTEIN: I can confirm that for you.  
15 Another good example of the breadth of people involved in  
16 this case, Interrogatories number 2 and 3, some of these  
17 witnesses were identified, Mr. Ewen Setti, I believe is his  
18 name, he was identified in response to Interrogatory Number  
19 2 and 3, along with 34 other people. So there's nothing in  
20 those disclosures. There's nothing in the documents that  
21 would identify for us this is the guy. This is the one that  
22 they're going to bring to trial on a certain subject matter.

23 THE COURT: What about -- maybe you're getting to  
24 it, but what about their point that when they identified 15  
25 witnesses on their original Rule 26 disclosure, FICO only

1       deposed three of them anyway.

2               MS. KLIEBENSTEIN: I'm very glad you asked that  
3       question. It's an important issue to get right. Out of  
4       context, that statement is very misleading. So when you go  
5       back through the history of discovery, you can understand  
6       our strategy and where we went.

7               Federal's initial disclosures dated March 17th  
8       only had four witnesses on it. So we have Ms. Palowski, and  
9       then Henry Mirollyuz, Pamela Lopata, Ramesh Pandey. Tom  
10      Carretta is a FICO gentleman within our custody and control.  
11      So we deposed three of those four people. We did not depose  
12      Ms. Pamela Lopata. She's a lawyer. And we deemed her  
13      testimony to be entirely duplicative of that from  
14      Ms. Palowski based on the documents. So, at this time, we  
15      chose to depose three of the four fact witnesses.

16              At the same time in 2017 and 2018, this is all we  
17      had, so we developed a litigation strategy to get the  
18      testimony that we need through use of 30(b)(6) depositions,  
19      and we served three 30(b)(6) notices, 33 topics. I think  
20      maybe 80 include subparts, and that's how we went after the  
21      factual information that we needed in this case.

22              And then in January of 2019, they supplemented to  
23      add seven new witnesses. And at that time, we took a look  
24      at our strategy, and we took a look at our witnesses, and we  
25      decided not to depose those seven people and here's why.

1 Three of those people were from outside of the United  
2 States, and their subject matter was use of Blaze Advisor in  
3 Canada, Australia and the UK. Our 30(b)(6) topics have  
4 covered that. We felt like we needed on those subjects such  
5 that we didn't need to go to Canada, Australia, and the UK  
6 to depose them.

7 The other four witnesses in those January 2019  
8 supplements, the other four people related to the 2006  
9 contract negotiations. We were comfortable with our  
10 knowledge about that story both from the FICO and Federal  
11 perspective, and we were also comfortable relying on  
12 cross-examination should those witnesses come to trial.

13 So having committed to a 30(b)(6) deposition  
14 testimony strategy, being willing to rely on  
15 cross-examination at trial, and given the limited time  
16 remaining in fact discovery, we chose to stay with our  
17 current plan of deposition approach.

18 That all changed on March 22nd when there were 16  
19 new witnesses that are primarily targeted to defense of the  
20 damage's case, to possibly apportionment of the profits  
21 relating to infringement under disgorgement analysis. To  
22 say that we wouldn't have deposed these people presumes a  
23 fiction that if we had to go back and reassess if we had all  
24 31 of these witnesses in front of us, what would we do? We  
25 would have a different discovery strategy. We would attack

1 it differently. I can assure you of that.

2 Would we depose all 16 of these witnesses? That  
3 would require a lot of analysis and for us to reassess the  
4 case in its entirety. But to say that we wouldn't have  
5 deposed any of them any way is not, out of context, it's not  
6 true. So I'm very glad you asked that question.

7 Moving back to the timeliness, with regard to the  
8 witnesses identified as having verified responses to the  
9 interrogatories, the problem here is that while we may have  
10 been able to discover the name of these witnesses, these  
11 subjects that are shown in the second amended initial  
12 disclosures are broader than simply explaining the  
13 verification of those interrogatories. And keep in mind  
14 that 16 through 18 asked for, or 16 through 20 asked for the  
15 gross written premium that went through Blaze Advisor  
16 software. So if you look at these subjects, it's much  
17 broader.

18 We have the same problem moving into the group of  
19 witnesses that helped, allegedly helped gather data in  
20 response to requests for production 30 through 32. While we  
21 could have possibly found their name on some document  
22 somewhere, that still doesn't disclose the subject matter of  
23 the knowledge that's in the second amended initial  
24 disclosures. And mind you, this is much broader than laying  
25 foundation for some charts produced in response to requests

1 for production 30 through 32.

2 Moving to Mr. Harkin, Federal contends that we had  
3 an awareness of Mr. Harkin. There was no need to disclose  
4 him on the initial disclosures because we deposed him.  
5 However, we weren't notified of Mr. Harkin's name until the  
6 final week of discovery. We were notified that he would be  
7 the 30(b)(6) deponent on our topics in our last 30(b)(6)  
8 notice and that deposition was to take place on March 25th.  
9 He was added to the initial disclosures on the afternoon of  
10 Friday, March 22nd. To the extent that we could have  
11 somehow ameliorated this prejudice over that weekend is --  
12 that's an unfair proposition to put FICO in.

13 Further in that 30(b)(6) deposition, there could  
14 not have been exploration of Mr. Harkin's knowledge as a  
15 fact witness. When any questions were asked outside of the  
16 subjects of the 30(b)(6) notice, they were shut down by  
17 counsel. There was no exploration beyond his capacity as a  
18 30(b)(6) deponent. So in sum, the deposition of Harkin as a  
19 30(b)(6) deponent is not akin to disclosure on the initial  
20 disclosures.

21 We've discussed Mr. Setti before. He's just one  
22 individual listed on a number of documents with dozens of  
23 other people. He was identified in response to  
24 interrogatories number 2 and 3, along with 34 other people.  
25 The trouble with Mr. Setti is his subject matter is

1 knowledge regarding Blaze Advisor use in the United Kingdom.

2 Now, when defendants did their first supplemental  
3 disclosures in January, an individual named David Gibbs was  
4 identified on the same subject matter, and Mr. Gibbs is also  
5 one of these 34 people identified in Interrogatories Number  
6 2 or 3. Clearly, he was the guy that was going to testify  
7 on Blaze Advisor use in the United Kingdom. We would have  
8 no ability to guess that Mr. Setti would have been.

9 And, finally, moving on to Claudio, I won't even  
10 try his last name because I know I won't get it right.  
11 Federal contends it didn't need to add Claudio to the  
12 initial disclosures because he was the individual  
13 responsible for settlement discussions in this case.  
14 However, that is not the same as telling FICO that Claudio  
15 has discoverable information that Federal may use to support  
16 its claims and defenses in this case. The description for  
17 his testimony is Blaze Advisor rules usage, not settlement  
18 discussions.

19 Moving into substantial justification, there isn't  
20 much in the response brief about that. We don't get any  
21 explanation as to why these witnesses that FICO should have  
22 been aware of, why they weren't added before along with  
23 their subject matter. The contention is that this late  
24 disclosure is substantially justified because the majority  
25 were identified in discovery.